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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RALPH VASQUEZ, Plaintiff and Appellant, v. U.S. BANK N.A., as Trustee, etc., Defendant and Respondent.	E064684 (Super.Ct.No. RIC1403468) OPINION

APPEAL from the Superior Court of Riverside County. Sunshine S. Sykes, Judge. Affirmed.

Rodriguez Law Group, Inc., Patricia Rodriguez and George M. Hill for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Kerry W. Franich and Elizabeth C. Farrell for Defendant and Respondent.

I

INTRODUCTION

This appeal arises from plaintiff Ralph Vasquez's claims for wrongful foreclosure.

Defendants successfully demurred to most of the first amended complaint (FAC) and prevailed on a summary judgment motion on the cause of action for violations of 15 United States Code section 1641(g).

We hold Vasquez cannot state a claim for wrongful foreclosure because no foreclosure was completed. He also lacks standing to attack the assignment of the deed of trust because the assignment was voidable, not void. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815 (*Saterbak*); *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810-820 (*Mendoza*).) His cause of action for violation of Civil Code section 2924, subdivision (a)(6), unsuccessfully relies on the same theory that the assignment of the deed of trust was void. More importantly, section 2924, subdivision (a)(6), grants no private right of action. The cause of action for violation of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200) was correctly dismissed because Vasquez neither alleged facts showing that defendants engaged in unfair competition or that Vasquez lost any money or property as a result of any supposedly unfair competition. It was also not an abuse of discretion to deny leave to amend when Vasquez cannot allege any new facts that would lead to a different outcome.

We also hold the motion for summary judgment was correctly granted because the Truth in Lending Act (TILA) on which Vasquez relies only applies to a transfer of a borrower's debt, not a transfer of a security interest like an assignment of a deed of trust. The assignor in this case—Mortgage Electronic Registration Systems, Inc. (MERS)—

only held the deed of trust, not the promissory note. So, the assignment fell outside TILA's scope.

Finally, Vasquez has not shown that the trial court abused its discretion in granting defendants' requests for judicial notice. His opening brief is deficient in that it does not include record citations supporting material facts. (Cal. Rules of Court, rule 8.204(a)(1)(C).) We affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

Our summary of the underlying facts is derived from the allegations of plaintiff's two versions of the complaint, the undisputed material facts, and the supporting documentation submitted by the parties to the trial court.

In August 2007, Vasquez obtained a $408,000 loan secured by a deed of trust encumbering real property in Corona. Defendant MERS was identified as the beneficiary of the trust deed.

A pooling and service agreement (PSA) for the conveyance of MERS mortgage loans was established for an REMIC (real estate mortgage investment conduit) trust on January 31, 2010. Defendant U.S. Bank National Association was the trustee named under the PSA. Vasquez alleges the closing date on the trust was March 30, 2010.

On January 30, 2013, defendant Nationstar Mortgage, the mortgage servicer, filed a declaration attesting to its due diligence in contacting Vazquez about the default on his loan and the right to foreclose.

On May 9, 2013, a corporate assignment of deed of trust was recorded in which MERS assigned the subject deed of trust on April 30, 2013, to U.S. Bank, the trustee for the REMIC trust. On May 30 and August 8, 2013, Nationstar recorded a substitution of trustee for the subject trust deed. On December 23, 2013, the trustee filed a notice of default. A notice of trustee's sale was recorded on September 10, 2014.

Vasquez filed this lawsuit in April 2014 against Nationstar, MERS, U.S. Bank, and other defendants. In the FAC, Vasquez alleged that defendants lacked standing to foreclose because the assignment by MERS of Vasquez's deed of trust to the REMIC securitized trust was purportedly accomplished after the trust's closing date. Second, Vasquez alleged that U.S. Bank violated the TILA by failing to notify Vasquez when MERS assigned the deed of trust to U.S. Bank.

The trial court sustained the demurrer of MERS and Nationstar without leave to amend on all causes of action of the FAC and sustained U.S. Bank's demurrer without leave to amend except for the TILA cause of action. Vasquez filed a second amended complaint (SAC) that asserted a single cause of action against U.S. Bank for violating the TILA. U.S. Bank answered the SAC then moved for summary judgment. After the trial court granted the motion, it entered judgment for defendants.

III

DISCUSSION

On appeal, Vasquez challenges the trial court's rulings on the demurrers, denying Vasquez leave to amend his claims, and granting U.S. Bank's motion for summary

judgment. Vasquez also contends that the trial court erred regarding defendants' requests for judicial notice. We reject these contentions.

Demurrer/Leave to Amend

Vasquez focuses on the three claims in the FAC for wrongful foreclosure, violation of Civil Code section 2924, subdivision (a)(6), and violation of the UCL. He does not address—and thus has waived—his claim for equitable estoppel, the fifth cause of action of the FAC.

In reviewing a ruling on a demurrer, this court "independently evaluate[s] the complaint, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context." (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 486.) We treat "'the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] [The court] also consider[s] matters which may be judicially noticed.'" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; quoting *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

The denial of leave to amend is also reviewed for an abuse of discretion. (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 744; *Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 992; *Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) "To show abuse of discretion, plaintiff must show in what manner the complaint could be amended and how the amendment would change the legal effect of the complaint, i.e., state a cause of action." (*Buller,* at p. 992.)

Wrongful Foreclosure

Vasquez cannot satisfy the three elements comprising wrongful foreclosure because 1) there has not been a foreclosure, 2) he has suffered no harm, and 3) he has not tendered the amount owed to the lender. (*Miles v. Deutsche Bank National Trust Co.* (2015) 236 Cal.App.4th 394, 408.) The parties agree there has not been a sale, so Vasquez cannot satisfy the first element. Element two is absent because, as the trial court recognized, there cannot be harm from a sale that has not occurred.

Finally, element three is not satisfied because a borrower who defaults on his payments is "required to allege tender of the amount of [the lender's] secured indebtedness in order to maintain any cause of action . . . ." that seeks redress from foreclosure proceedings. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439 [tender rule strictly enforced; *United States Cold Storage v. Great Western Savings & Loan Assn.* (1985) 165 Cal.App.3d 1214, 1225.) Absent an alleged and actual tender, the complaint fails to state a viable cause of action. (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526; *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117-120.) Vasquez has not alleged any tender or that any exception to the tender rule applies.[1] Vasquez is not excused from tendering because no foreclosure has occurred. The only difference is that, before a foreclosure occurs, equity demands tender of the amount

[1] *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-113, identifies four exceptions: (1) when the borrower attacks the validity of the debt; (2) when the borrower has a counterclaim or setoff greater than the amount due; (3) when requiring tender would be inequitable; and (4) when the trustee's deed is void on its face.

needed to bring the loan current, rather than the entire debt. (Civ. Code, § 2924c, subd. (e).) Because the three elements of wrongful foreclosure are absent, this cause of action fails.

Standing

To the extent that Vasquez claims he has standing to challenge a "void" assignment of the subject trust deed, he does not have standing. In *Yvanova v. New Century Mortgage Corporation* (2016) 62 Cal.4th 919, 936 (*Yvanova*), the California Supreme Court held that a borrower has standing to challenge an assignment based on an alleged defect that would render the assignment void, but not when the alleged defect would merely render the assignment voidable. *Yvanova* did not hold an assignment is void because of a transfer to an REMIC. Recent case law addressing *Yvanova*, has rejected Vasquez's contention: ". . . we reject the notion that an untimely transfer to a[n] REMIC automatically voids the transaction. The tax implications of securitization simply do not render a voidable transaction void." (*Mendoza, supra,* 6 Cal.App.5th at p. 819.) Because Vasquez contends that the assignment in this case was accomplished after a trust's closing date, the assignment is at most voidable, not void: "We conclude such an assignment is merely voidable." (*Saterbak, supra*, 245 Cal.App.4th at p. 815.) The FAC alleged a defect that would render the assignment of the subject trust deed merely voidable, not void.

Preforeclosure Challenge

Finally, a wrongful foreclosure claim cannot be asserted by Vasquez: "California courts have refused to delay the nonjudicial foreclosure process by allowing trustor-

debtors to pursue preemptive judicial actions to challenge the right, power, and authority of a foreclosing 'beneficiary' or beneficiary's 'agent' to initiate and pursue foreclosure." (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 511, citing *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440-442, and *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1157.)

A claim "is 'preemptive' if the plaintiff alleges no 'specific factual basis' for the claim that the foreclosure was not initiated by the correct person." (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 82, disapproved on other grounds in *Yvanova*, 62 Cal.App.4th at p. 860.) Allowing such a suit "would unnecessarily 'interject the courts into [the] comprehensive nonjudicial scheme' . . . and 'would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.'" (*Siliga*, at pp. 82-83; *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 743-744.)

Vasquez does not offer any specific allegations as to why foreclosure based on his default is not authorized. He does argue that the assignment of the trust deed was recorded in 2013, about three years after the trust's alleged closing date. But a recorded assignment does not establish when the underlying note was actually transferred. California law does not require that an assignment of the deed of trust be recorded to reflect or "perfect" the transfer of a secured note and loan. (Cal. U. Com. Code, § 3203, subd. (a); *Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118, 122.) Instead, it is more common to record an assignment of a trust deed shortly before proceeding with a nonjudicial foreclosure sale.

Nothing in *Yvanova* permits borrowers to file preforeclosure lawsuits that challenge a lender's authority to foreclose. As *Saterbak* recently explained: "*Yvanova*'s ruling is expressly limited to the post-forelosure context. . . . Because *Saterbak* brings a preforeclosure suit challenging Defendant's ability to foreclose, *Yvanova* does not alter her standing obligations." (*Saterbak, supra*, 245 Cal.App.4th at p. 815.) For the reasons described above, Vasquez's suit is an improper, preemptive attack on the defendants' authority to enforce the deed of trust.

Civil Code Section 2924, Subdivision (a)(6)

Vasquez contends that his FAC sufficiently alleged a cause of action for violation of Civil Code section 2924, subdivision (a)(6), which provides:

"No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest."

Vasquez complains that U.S. Bank violated Civil Code section 2924, subdivision (a)(6), by initiating the foreclosure process even though it is not the true holder of the note and deed of trust. As already explained, Vasquez lacks standing to assert this argument. Furthermore, Civil Code section 2924, subdivision (a)(6) cause of action

grants no private right of action. (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 596.)

A borrower may have a right of action under the Homeowner Bill of Rights[2] (HBOR). But Civil Code section 2924, subdivision (a)(6) is not one of the sections identified in section 2924.12: "[B]y negative implication the Legislature did not intend to extend that list beyond the specified matters." (*Songstad v. Superior Court* (2001) 93 Cal.App.4th 1202, 1208.) The statute's text proves the Legislature never intended to create a cause of action for violation of Civil Code section 2924, subdivision (a)(6). Therefore, the demurrer was properly sustained to the Civil Code section 2924, subdivision (a)(6) cause of action without leave to amend.

UCL Violation

Vasquez next argues he sufficiently alleged defendants engaged in deceptive business practices by executing and recording documents without the legal authority to do so. However, recording the trust deed could not be wrongful because Vasquez concedes he obtained the loan and signed the deed of trust. Executing and recording the assignment also was not a deceptive practice. When Vasquez signed the trust deed, he acknowledged that MERS "and the successors and assigns of MERS" would serve as the

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[2] The HBOR (Civ. Code, §§ 2920.5, 2923.4–2923.7, 2924, 2924.9–2924.12, 2924.15, 2924.17–2924.20) "effective January 1, 2013, was enacted 'to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure.' (§ 2923.4, subd. (a).)" (*Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.)

beneficiary of the deed of trust as nominee for the lender and its successors. Vasquez agreed that MERS had the right to take various actions as beneficiary, precluding Vasquez from challenging MERS's authority to execute or record the assignment. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1505, disapproved on other grounds in *Yvanova*, 62 Cal.4th at p. 939, fn. 13; *Gomes v. Countrywide Home Loans, Inc.*, *supra,* 192 Cal.App.4th at p. 1157.) Executing and recording the substitution of trustee was equally proper. Because the substitution of trustee was recorded in the county records, the new trustee's authority to act is conclusively presumed by statute. (Civ. Code, § 2934a, subd. (d).) Similarly, it was not improper to execute or record the notice of default when Vasquez implicitly conceded he was in default in the amount of $63,560.57.

Additionally, the UCL cause of action is derivative because it repeats the same theory alleged in the other causes of action—that defendants lack the authority to enforce the deed of trust. Like those claims, the UCL cause of action is not viable. (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 277; *Krantz v. BT Visual Images, LLC* (2001) 89 Cal.App.4th 164, 178.)

Vasquez also lacks standing to assert his UCL cause of action absent any injury or loss. (Bus. & Prof. Code, § 17204.) Vasquez claims he suffered economic injury in lost down payment and equity, ruined credit, and attorney fees and costs. However, none of these items suffice to establish standing because they stem from Vasquez's admitted default and because fees and costs are not damages within the meaning of the UCL. (*In re Google Inc. Street View Electronic Communications Litigation* (N.D. Cal. 2011) 794

F.Supp.2d 1067, 1086 (treating attorney fees as a loss of money or property would "effectively eviscerate the heightened standing requirements".) At day's end, it was Vasquez's default that triggered the power of sale clause in the deed of trust and subjected his property to nonjudicial foreclosure—not any of the defendants' purported unfair business practices.

Denial of Leave to Amend

To show error in denial of leave to amend, Vasquez must show that there is a reasonable possibility he can allege facts that cure the defects in the claims he alleged. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, quoting *Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.) The plaintiff must clearly and specifically state "'the legal basis for amendment, i.e., the elements of the cause of action,' as well as the 'factual allegations that sufficiently state all required elements of that cause of action.'" (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 95, quoting *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

Vasquez did not carry his burden to show any additional facts that might revive his causes of action. Instead, he seeks leave to amend to "clarify his arguments." Vasquez does not explain why he did not undertake discovery to amplify his claims. In any event, the flaws in the complaint are not factual but legal.

Summary Judgment

We also independently review a summary judgment, applying, "the same three-step analysis used by the superior court." (*Rosales v. Battle* (2003) 113 Cal.App.4th 1178, 1182.) First, the court identifies the issues framed by the pleadings. (*Ibid*; *County*

of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal.App.4th 292, 332; *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.) Next, the court determines whether the moving party has negated the opponent's claim. (*Rosales*, at p. 1182.) The moving party "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact . . . ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) Finally, the court decides """whether the opposition demonstrates the existence of a triable, material factual issue."""" (*Rosales*, at p. 1182.) If the moving defendant meets its initial burden of production, "the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action . . . . In doing so, the plaintiff cannot rely on the mere allegations or denial of his pleadings, 'but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . .'" (*ML Direct, Inc. v. TIG Specialty Ins. Co.* (2000) 79 Cal.App.4th 137, 141.)

Summary judgment was correctly granted as to Vasquez's TILA cause of action because the SAC alleged no facts showing a violation of 15 United States Code section 1641(g). A defendant moving for summary judgment need not show the absence of triable issues when the complaint alleges no viable claim—as we have already discussed at length. (*Stolz v. Wong Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1817.) In addition, defendant has not effectively disputed any of the material facts that support granting summary judgment in favor of defendant U.S. Bank.

When distilled to its essence, Vasquez's contention is that U.S. Bank made a transfer of creditor's rights on April 30, 2013, and U.S. Bank was required to notify

Vasquez within 30 days, or by May 30, 2013. The sole supporting evidence is an expert declaration, stating that "I am of the opinion that: There was a transfer of creditors rights as of April 30, 2013. U.S. Bank, N.A., was required to notify debtor Ralph Vasquez of the transfer of creditor's rights within 30 days of the transfer, namely by May 30, 2013." However, the date of April 30, 2013, shown on the recorded assignment of the trust deed does not reveal when the underlying note was actually transferred or negotiated: "Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267, disapproved on other grounds in *Yvanova*, 62 Cal.4th at p. 939, fn. 13.)

The California Uniform Commercial Code additionally provides that negotiable instruments cannot be transferred by trust deed assignment and, instead, only by delivery of the instrument. (See Cal. U. Com. Code, §§ 3104, subd. (a), and 3203, subd. (a).) Because the assignment of the Vasquez trust deed says nothing about when the corresponding note was actually transferred, the recorded assignment could not support a reasonable inference that the note was actually transferred on April 30, 2013. Vasquez submits no supporting evidence to show that the note was transferred on April 30, 2013.

Furthermore, Vasquez has no viable TILA cause of action because MERS's assignment of the trust deed to U.S. Bank never triggered 15 United States Code section 1641(g)'s notice requirement. Regulation Z, which implements TILA, explains that a

person is covered by 15 United States Code section 1641(g) if he or she "becomes the owner of an existing mortgage loan by acquiring legal title to the debt obligation, whether through a purchase, assignment or other transfer, . . ." (12 C.F.R. § 1026.39(a)(1).) The "plain language" of 15 United States Code section 1641(g) refers only to transfers of the debt, not the security instrument. (*Giles v. Wells Fargo Bank, N.A.*, 519 Fed. Appx. 576, 578 (11th Cir. 2013); *Barr v. Flagstar Bank, F.S.B.*, 2014 U.S. Dist. LEXIS 129878, *10 (D. Md. Sept. 17, 2014.) The subject deed of trust makes clear that MERS "holds only legal title to the interests granted by Borrower in this Security Instrument, . . ." So while MERS acts as the beneficiary of deeds of trust in official county records, the lenders retain the promissory notes. (*Gomes v. Countrywide Home Loans, Inc.*, *supra*, 192 Cal.App.4th at p. 1151; *Fontenot v. Wells Fargo Bank, N.A.*, *supra*, 198 Cal.App.4th at p. 267.)

MERS does not own and therefore cannot transfer Vasquez's promissory note and its assignment of the trust deed to U.S. Bank could not have transferred legal title to the debt. Transferring a security interest in the property is not enough to trigger TILA's notice requirement. The assignment from MERS to U.S. Bank is not a transfer within the meaning of 15 United States Code section 1641(g), so the trial court correctly granted U.S. Bank's motion for summary judgment.

Judicial Notice

Vasquez contends that the trial court abused its discretion by granting defendants' request for judicial notice and wrongly accepted the truth of the matters stated in the recorded assignment. Orders granting or denying requests for judicial notice are

reviewed for abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A., supra*, 198 Cal.App.4th at p. 264.) A trial court's order granting judicial notice is presumed correct. (*Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 787.) Nothing in the record shows that the trial court improperly noticed the truth of any facts in the recorded documents—copies of which were attached to Vasquez's complaint.

Furthermore, the outcome was unaffected by any error. Vasquez's causes of action were defective for reasons unrelated to any facts stated in the recorded assignment. Vasquez cannot show that he would have achieved a more favorable result.

IV

DISPOSITION

The trial court correctly sustained defendants' demurrers without leave to amend and granted defendant U.S. Bank's motion for summary judgement.

We affirm the judgment. Defendants, as prevailing parties, shall recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.